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IN THE

Supreme Court of the United States

Term, 1945.

No. 355

ERNEST E. SCARBOROUGH,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ernest E. Scarborough, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 24, 1945.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported.

The opinion of the United States Circuit Court of Appeals (R. 67) is reported in 149 Fed. 2d, 636.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 24, 1945 (R. 67). The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a).

QUESTIONS PRESENTED.

1. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably safe and sufficient tools and appliances with which to perform his work?

2. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably sufficient and skillful fellow servants to perform the work?

3. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent was negligent in that the Petitioner's fellow servants failed to properly and adequately remove the rust from the beam at the point where the lighting fixture was to be attached by the Petitioner?

CONSTITUTION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE FACTS.

This was an action brought by Ernest E. Scarborough under the Federal Employers Liability Act (45 U.S.C.A., Sec. 51, et seq.), and its amendment of 1939, for damages suffered by reason of injury to him on April 21st, 1941, while engaged in interstate commerce in the employ of the Pennsylvania Railroad Company.

The case, after issue joined, was tried before the Hon. George A. Welsh, presiding in Philadelphia for the Eastern District of Pennsylvania, and a jury. At the conclusion of the petitioner's evidence, the respondent moved for binding instructions in favor of the respondent under Rule 50 of the Rules of Civil Procedure; the motion was granted, with exception thereto, taken by the petitioner.

The petitioner appeals to this Court from judgment entered by the Court below on November 27th, 1944, which provided as follows:

"Granting judgment for defendant with costs" as a directed verdict at the request of the defendant.

Ernest E. Scarborough began to work for the Pennsylvania Railroad Company in 1918 and worked continuously for it up to April 21, 1941, the date of the accident (R. 9). He is married and has two sons and lives in Andalusia, Bucks County, Pennsylvania (R. 9). As a result of the accident he was away from his employment until September, 1941 (R. 35).

He is a switchman employed in the Signal Department and, in the course of his duties, installs electric fixtures (R. 10). At the time of the accident, he was engaged in interstate commerce. *Scarborough vs. Pennsylvania Railroad Company,* 154 Pa. Sup. 129 (1944).

On April 21, 1941, as for several days previous, the plaintiff had been working with Underdown and McLaughlin, two fellow-employees, renewing the station lighting fixtures

at the West-bound station at Bryn Mawr, Pennsylvania (R. 13), *under a foreman named Frankenfield* (R. 10). The petitioner merely acted as leader among the three men doing the actual work (R. 10), i.e., Scarborough, Underdown and McLaughlin.

The men were sent to this station where they were supposed to remove all the old cable and light fixtures, clean the metal beam to which the cable was attached, of all rust, and reinstall new cable and lighting fixtures (R. 14). On the day in question, there were three fixtures that were to be renewed in toto, as above described (R. 11).

The men arrived by train at 9:00 A. M., at Bryn Mawr. The railroad delivered by truck the materials, appliances, supplies and the tools with which to perform the job (R. 13). *The tools necessary for this job were supposed to be selected and designated by the foreman, Frankenfield* (R. 16, 17). *Furthermore, the inspector who ordered the job done originally, knew what tools and supplies the job required* (R. 15).

An examination of the tool box delivered to the men on April 21, 1941, by the respondent (R. 13), revealed that there was no wire brush (R. 16), nor scraper, *the usual tools for cleaning or scraping rust,* in it (R. 14, 15), *nor any other tool for that purpose.*

An absolute prerequisite to the rewiring of these electric fixtures was, that the beam be cleaned and scraped free of all rust so as to prevent quick deterioration of the new fixtures (R. 14, 16, 17, 49, 50).

During the morning of April 21, 1941, all three men had worked at removing the old wire on lights 1 and 2, cleaned the girder over those two lights of rust and otherwise prepared those two lights for the hanging of fixtures on them. In addition, the cable had been strung over the girders from the No. 2 light to the No. 3 light, but it had not yet been put in place, as the old wire had not yet been taken down from No. 3 light, nor had the beam as yet been cleaned of rust around that light (R. 22, 23).

In cleaning the beam around No. 1 and No. 2 lights, the men had used an old broom and some waste found by the petitioner in a nearby tower (R. 14), because the usual sharp edge or cutting tools for the removal of rust had either not been ordered by Frankenfield, their foreman, or the inspector or the maintenance and supply departments had failed to ship them (R. 14), if ordered.

In the cleaning of the beam of rust around No. 1 and No. 2 lights, the men all used goggles (R. 18), supplied by the railroad for scraping operations as directed by Section P of Rule 8651 for eye protection (R. 62).

In the afternoon the petitioner went to No. 1 and No. 2 lights and personally hung the fixtures on them because of the graver responsibility involved in that work and the danger of damage to railroad property if they were not properly spliced into place (R. 18).

While hanging the fixtures, 1 and 2, after the beam near them had been cleaned of rust, Scarborough did not wear his goggles as there is generally no eye hazard in that work (R. 21). Nothing untoward happened while Scarborough hung fixtures Nos. 1 and 2.

In the afternoon, while Scarborough hung the fixtures on No. 1 and No. 2 lights, *Underdown* and *McLaughlin* undertook to remove the old cable running from No. 2 to No. 3 and *to clean the beam around No. 3 of all rust*, and otherwise prepare No. 3 light for the petitioner to come over to later and there hang its light fixture (R. 22, 47).

The petitioner spliced the wires for the fixtures on No. 3 and was putting the cover over the receptacle box, when by that slight simple operation, rust and dirt were dislodged from the *supposedly previously cleaned beam*, and some particles went into his eye (R. 22).

The petitioner was not wearing his goggles during this operation, for the same reason that he did not wear them when performing the similar operation at No. 1 and No. 2, namely that he thought his fellow-employees had properly cleaned the beam of all scaly rust (R. 23).

Not only did the dirt and rust come down on the peti-

tioner's face and some into his eye, but some of it in flakes was still above the cable and on the girder above the box (R. 22) after the accident.

The petitioner immediately complained to a fellow-employee about the occurrence as he descended from the ladder (R. 25). As a result of the lodging of foreign particles in the petitioner's eye, infection quickly set in and he has permanently and totally lost the sight of his right eye (R. 32).

Petitioner's Complaint (R. 4) averred insufficiency of tools and appliances with which to do the work; inadequate help and the negligence of fellow-employees in failing to properly remove the rust from the beam or, to the alternative, to warn the Petitioner thereof.

At the trial the Respondent moved for and was granted a directed verdict at the close of the Petitioner's case.

The Petitioner appealed to the Third United States Circuit Court of Appeals at Philadelphia which, per curiam, affirmed the action of the trial judge, without discussion of the issues.

By this action, the Circuit Court affirmed the ruling below, that the evidence on whether the master performed its common-law and statutory duty of supplying adequate and proper tools and appliances and whether the petitioner's fellow-employees were guilty of actionable negligence was not sufficient to justify submission as issues of fact to the jury.

Furthermore, it affirmed the rulings thereon made by the trial judge, who in commenting on his ruling, clearly showed that he based it on (1) an erroneous understanding of the effect of Petitioner's contributory negligence (if any), and (2) a wrongful application of the doctrine of assumption of risk which had been removed as a defense by the Amendment of 1939 prior to the occurrence of this accident (R. 58-62).

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for Respondent.

2. In failing to reverse the Trial Court's order granting judgment for the Respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (Third) is in direct conflict with the decisions of this Court, as expressed in *Blair vs. B. & O. R. R. Co.*, 323 U. S. 600; *Bailey, Admx. vs. Central of Vermont*, 319 U. S. 350; *Pederson vs. D. & W. Ry. Co.*, 229 U. S. 146; *Tennant vs. Peoria & P. V. Ry. Co.*, 321 U. S. 29.

3. This is the first case presented to the Court for interpretation of the Federal Employers Liability Act after the Amendment of 1939 withdrawing assumption of risk as a defense as it applies to *non-operating* railroad employees, who by the other Amendment of 1939 have had withdrawn the protection of local workmen's compensation laws and whose causes of action will in each instance be predicated upon the sufficiency of the evidence to establish negligence (a) in that the railroad failed to provide a safe place to work or to supply proper and adequate tools, appliances and men for the work to be done or (b) that a fellow-employee was careless.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

ERNEST E. SCARBOROUGH,
By B. NATHANIEL RICHTER and
I. LOUIS RUBIN,
Attorneys for Petitioner.

BRIEF.

ARGUMENT.

Non-operating employes most frequently sustain injury by acts of omission rather than commission. Accidents occur because the railroad fails to supply these employes with a safe place to work, proper appliances, adequate help, or because of the non-performance of a duty by a fellow employe. It is only the occasional case where one of this class of employes can point to a specific act of commission as the efficient cause of injury. Even in that exceptional instance, it is usually merged with other acts of omission.

This Court, in *Bailey v. Central Vt. Ry.*, 319 U. S. 35, *Tennant v. Peoria & P. U. Railway Co.*, 321 U. S. 29, and *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, has held that whether these acts of omission constitute negligence is exclusively for jury determination.

Nevertheless, trial courts are troubled again and again by that part of the decision in *Chicago & N. W. R. R. Co. v. Bowers*, 241 U. S. 470, which we have herein italicized.

> "The rule of law is: that the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employe, *but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable.*" (Italics ours.)

This last phrase is frequently interpreted below as meaning that that issue is one of law rather than of fact. Evidence to establish the proper tool, the safe procedure, and the manpower needed for the job has therefore been repeatedly excluded.

Despite the BLAIR decision, supra, there have since been three decisions in state appellate courts as well as several in the United States District Courts so ruling. It was so ruled in the instant case.

If the thousands of non-operating employes now embraced by the Federal Employers Liability Act are to be benefited by the 1939 amendment eliminating assumption of risk in all its corollary phases as a defense, and if they are to be provided with the superior protection intended by the Federal Employers Liability Act, a directive in unmistakable language must issue from this Court to those below so stating.

I. THE COURT BELOW ERRED IN HOLDING THERE WAS NO EVIDENCE OF NEGLIGENCE IN FAILING TO SUPPLY ADEQUATE SCRAPING TOOLS OR IN THE CONDUCT OF THE PLAINTIFF'S FELLOW SERVANTS.

(a) Appliances Inadequate.

The Petitioner herein contends that the evidence established that the defendant, by its foreman, Frankenfield, failed to order the tools necessary to perform the designated task, or, if Frankenfield did order the necessary tools, then the supply department failed to include tools for cleaning the beams of rust in the shipment it sent by truck to this job.

The Petitioner and the others came to the job by train. The usual practice was to have all supplies, material and tools waiting for the men when they arrived. No tools for scraping the rust were included in the supplies. So important was it to clean the beams of rust before putting in the new cable that the petitioner went to a nearby tower to see if he could find something with which to remove the

rust. He found an old broom and some waste and decided to try to make them do.

It is elementary hornbook law that even at common law, and before the Employers Liability Cases, a master had always been under a duty to use reasonable care to provide his servants reasonably safe appliances, tools and equipment with which to work. *Prosser on Torts*, 1941, page 508.

Quite beyond dispute, also, is the recognition of the continuance of the duty to provide reasonable tools for the work performed, under the Federal Employers Liability Acts. *Blair v. B & O R. R. Co.*, 323 U. S. 600; *Prosser on Torts*, page 508; along with the duty to use reasonable care to provide a safe place to work. *Bailey vs. Central Vt. Ry.*, 319 U. S. 350 (1943); 45 U.S.C.A. 51, paragraph 309.

The sole ground for contention here, as always, regarding the propriety of imposing liability under the rule requiring a master to provide reasonable tools, springs from the ever elusive character of the duty to use "reasonable" care. Wisely, the Courts have always eschewed arbitrary, rigid or mechanical standards for determining the existence of negligence, and have declined to make any one factor conclusive of the presence or absence of "due care". Instead, Courts have approached each negligence case on its own merits, weighing factor against factor.

The essential aim of the Courts' evaluation of particular circumstances in particular cases has been, and is, to determine whether the actor's conduct is of sufficient value and moment to justify the particular risks to which the conduct gives rise. If the risks outweigh the utility of the conduct, if the "game is not worth the candle", the actor has not exercised "due care". *Prosser on Torts*, p. 222, and cases there cited; *Restatement of Torts*, Sec. 291; *Chicago, etc., Ry. v. Krayenbuhl*, 65 Neb. 889 (1902). Negligence is "relative to the need and the occasion", Cardozo, C.J. in *Balington v. Yellow Taxi Corp.*, 250 N. Y. 14—1928; and is

determined by balancing the risk of harm against the utility of the actor's conduct. *Prosser,* pp. 222, 223.

Given conduct whose risks outweigh its utility, it matters not that the *precise* way in which harm occurs is unforeseeable, *Hill v. Winsor,* 118 Mass. 251 (1875); In re: *Polemus* 3 Q. B. 560 (1921) *Restatement of Torts,* 281, illustration one; Sec. 433 com. (e), 435; that the extent of the harm is not foreseeable; *Restatement of Torts,* 281, illustration one and Sec. 433, com. (e); that the precise *nature* of the harm is not foreseeable; In re: *Polemus* 3 Q. B. 560 (1921); nor indeed that the harm *itself* was not foreseeable, or probable, *Prosser on Torts,* pp. 221, 222, and cases in footnote 13.

As was said in *Tallgren v. Amoskeag Mfg. Co.,* 133 Atl. 4 (1926) N. H.:

> "Danger consists in the risk of harm as well as the likelihood of it, and a danger calling for anticipation need not be of more probable occurrence than less. If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care."

To this same effect, see *Sweeting v. P. R. R. Co.,* 142 Fed. 2d 611, 3rd Cir.

The extent of the chance that harm will result, the extent of the harm that may be occasioned, if any results at all, the number of persons endangered, the value put by society and the law upon the interests imperiled, and the ability of the actor to carry on his activity in another and less dangerous way, these are all factors to be weighed against the value of the actor's conduct and the likelihood of the

realization of that value. *Restatement of Torts,* Sec. 292, 293.

It is submitted that judged by these standards, the failure of respondent to supply the workmen in this case with a wire brush *was* unreasonable. No claim is advanced by respondent that its conduct in failing to provide the brushes involved any utility or benefit to the company. Indeed, it is conceded that respondent, although failing to provide them, *had* such brushes available and regarded their *use* as *beneficial* to its own interests. The only possible utility in failing to provide the brushes would be to permit respondent to indulge in indifference. On the other hand, failure to provide the brushes added to the peril that the eyes of any of three employes might be seriously hurt.

Nor is it of moment that rust specks *might* have entered petitioner's eyes anyway; *Reynolds v. Texas & P. Ry. Co.*, 37 La. Ann. 694 (1885); *Restatement of Torts,* Sec. 432 Com. c. It is enough that respondent's failure to provide the brushes materially bore on the result. Id. Neither is it significant, as contended by respondent, that it usually supplied the brushes only in order to facilitate the employer's work and better to paint the iron work. The question of respondent's negligence does *not* turn on *why it* chose in the past to supply the brushes. Even if it had never supplied brushes for the purpose of protecting its employes, the question is whether in the exercise of reasonable care the respondent was not bound to provide the brushes for their benefit. It is submitted that on balancing the risks inherent in failure to supply the brushes as against the possible utility therein, reasonable men would concede the "game was not worth the candle".

In the instant case, petitioner was lawfully on the premises as an employe. Respondent knew its employes were to work on rust, and yet failed to provide brushes which were not only inexpensive, but readily available. Under such circumstances, it would seem that the risks inherent in the failure to provide the brushes were far out of proportion

to any utility to be found in respondent's conduct, and that it was clearly negligent.

But even assuming, pro arguendo, that reasonable men might differ on whether the respondent exercised reasonable care, despite the failure to provide the brushes, it is submitted that, at least, a jury issue has been made out, entitling petitioner to go to the jury, and that the jury should have been permitted to decide if failure to provide the brushes was negligence. There is well established authority that it is generally a question for the *jury* whether an employer is negligent in failing to provide suitable tools and appliances: *Corpus Juris, Master & Servant,* p. 1134, Sec. 1326; and cases cited in footnotes 42 and 43 thereto.

In the case of *Blair v. B. & O. R. R. Co.,* supra, the railroad actually provided *some* tool with which to perform the designated task. The Court held, that it was for the jury to say whether that tool was adequate performance of its obligation. In our case, therefore, a'fortiori, it should be for the jury, where the railroad supplied *no tool at all* with which to perform a task which it specifically directed the petitioner and fellow employes to do.

(b) Fellow Employe Negligent.

Whatever the common law on the subject, it is now well established that an employe of a carrier may recover from the latter for harm suffered because of the negligence of fellow servants. *Prosser on Torts,* p. 546 and cases there cited; *Ill. C. Ry. Co. v. Skaggs,* 36 S. Ct. 249 (1915).

Should we assume, pro arguendo, that those entrusted with removing the rust over light No. III had been provided with the necessary means to satisfy the legal requirements, the evidence reveals that as soon as Scarborough applied the slightest pressure to the surrounding beam area, a mass

of more rust and dirt was dislodged. Was it not for a jury alone to say whether the beam cleaning job had been done carefully or negligently?

The petitioner personally did not clean this beam. At no time did he participate in that function. It was a function belonging exclusively to another, for whose conduct the railroad was responsible, that caused the petitioner's injury.

The jury alone must therefore under this evidence pass on whether that function had been carefully performed.

We consider it important to emphasize that the evidence does not indicate merely that a single speck of rust or dust was dislodged by the operation in which the petitioner was injured. It indicates rather that after the petitioner washed his eye, at the station and at home, there was only one particle of rust *remaining* in his eye. It was this one, of many particles of rust and dust, that the fellow employes carelessly overlooked and which showered the petitioner, that caused him to lose his eye.

At page 22R, the petitioner did say:

> "I hung the fixture, made the splice and finished taping it. I was just about to put the box cover up against the box when I felt rust and dirt coming off the box into my eye. Of course, I glanced up to see where it came from, and there was still some flakes above the cable and on the girder above the box."

As was argued above, if those means were inadequate for the performance of the job, then therein lay the negligence of the railroad in failing to provide adequate tools for a job it directed to be done, and the exact measure of which it was or should have been aware of. If those means were adequate, then the failure to completely remove the rust was proof of bad work by the petitioner's fellow employes.

Under the circumstances, respondent finds itself on the horns of a dilemma of its own making. If respondent did not supply reasonable tools, it is negligent on the reasoning above. If adequate tools *were* supplied for removing the

rust, then obviously the two employes previously directed to clean the rust from the metal beam were clearly remiss in their duty. If they had adequate tools for the purpose, as contended by respondent, then petitioner was reasonably entitled to rely on their proper performance of their assigned duty, especially since the first two lights were properly cleaned. Where two or more employes are working together, each has a reasonable latitude in relying upon the statements and conduct of the others in the course of the operation or a part of it: *Ill. C. Ry. Co. v. Skaggs*, 36 S. Ct. 249, 240 U. S. 66 (1915).

The two elements of negligence here alleged are necessarily intertwined and mutually complementary and fit accurately within the words of this Court when through Mr. Justice Black in *Blair vs. B. & O. R. R. Co.*, 323 U. S. 600, at pages 602, 603 it said:

"The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Railroad Co. vs. Hadley*, 246 U.S. 330, 332, 333, 38 S. Ct. 318, 319, 62 L.Ed 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

In *Union Pac. R. Co. vs. Hadley*, 246 U.S. 330, the following was said:

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

It is, therefore, respectfully submitted that under basic rules of negligence, the failure of the defendant to provide brushes, created risks out of proportion to every benefit

from such failure, and that plaintiff established a showing of negligence sufficient at least to be entitled to go to the jury as to inadequacy of tools and negligence of fellow servants.

II. THE COURT BELOW ERRONEOUSLY RULED IN EFFECT, THAT THE PETITIONER HAD ASSUMED THE RISK OF HIS EMPLOYMENT AND WAS THEREBY COMPLETELY BARRED FROM RECOVERY.

This accident occurred after the Amendment of 1939, that withdrew assumption of risk as a defense available to the employer in these cases.

On pages 58 and 59 of the record the Trial Judge, in explanation of the directed verdict for the defendant, said:

> "Now, it must be remembered—and we had this up for discussion while you were out,—that the plaintiff himself was the leader, and while the Railroad Company is charged with the responsibility of furnishing tools and equipment, the Railroad Company is an invisible entity, it is a corporate body that has no soul, and can only work and operate through its officers and employees, and this young man, the *plaintiff, was the man in charge of his own operation, and it was for him to say what equipment he wanted.* His lawyer, Mr. Richter, claims that the man who made the survey, the inspector, was the one who should have loaded up the truck that morning with all of the essential equipment necessary to do the job and a wire brush should have been placed in among the tools. But, the plaintiff, himself, Mr. Scarborough, says that when he got out to the job he looked around for the things with which to do the work, and that he went over to the tower, or sent someone over to the tower, to get waste and things to wipe the pipes and conduits clean, . . ." (Italics ours.)

What the Trial Judge was in effect saying was that the petitioner had assumed the risk of the job and that regardless of the inherent peril of performing the job in the established manner, or the failure of his foreman, Frankenfield to provide the brushes, if the petitioner was aware of the peril, then, if injured, he could not complain thereof.

This Court, in the *Tiller* case, supra, to use its own words, has, however, said (at page 58):

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by establishing the defense of assumption of risk in that statute, *did not mean to leave open the identical defense to the master, by changing its name to non-negligence.*" (Italics ours.)

Nor can the railroad contend that the petitioner assumed the risk of injury, since he knew that the brushes had not been supplied. Such argument is unavailing (1) because voluntary assumption of risk has been abolished as a defense under the 1939 amendment to the Employers Liability Act; *Tiller vs. Atlantic Coast Line*, 318 U. S. 54; (2) because such argument involves an admission that respondent failed to provide proper tools; (3) because in any event negligence of a fellow servant, even apart from the 1939 amendment, supports recovery even though the petitioner may have participated in the act which caused the injury: *Ill. Cent. Ry. Co. vs. Skaggs*, 36 S. Ct. 249, 240 U. S. 66 (1915); *Jones vs. Kans. City, So. Ry. Co.*, 145 S.W. 2d 969, Ark. (1941).

Further, at page 60 of the record, the learned Trial Judge said:

> "when he first started in to work he put his goggles on, and *found everything was so clean he thought he didn't need them and stopped using them. and when he came to the one in question where he got the dust in his eye he was not using the goggles,* and there were some particles of dust at this particular place. He

claims if he had a wire brush up there they would have dislodged the particles of rust, and it wouldn't have gotten in his eye. You women members of the jury know that it is a pretty good job of housekeeping when you get dust off as perfectly and accurately as that . . .

"Now, the question is whether we can, in law, charge the Railroad Company with negligence, and I can tell you as a matter of law, under the decisions and opinion of the Court, that that is not negligence in law sufficient to require the defendant to answer in damages." (Italics ours.)

By this language the learned Trial Judge charged that the petitioner was guilty of contributory negligence and that such contributory negligence was a complete bar to recovery. While not using the words "contributory negligence", he interpreted this conduct as such and then applied the effect of assumption of risk as a total deterrent to recovery. *He told the jury there was nothing the railroad could have done to have prevented this accident, and so ruled as a matter of law.* He thus held the railroad's conduct was one of non-negligence, as the petitioner was as aware of the danger as the respondent. He was thereby allowing the respondent the defense of assumption of risk though "every last vestige" of it has been removed from the law by the Amendment of 1939.

It is respectfully submitted that the reason for this misconception of the applicable legal principles arises from the failure to appropriately assess various acts of omission as negligent conduct by the respondent.

III. THE PLAINTIFF WAS ENTITLED TO A TRIAL BY JURY.

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled." *Robostelli vs. N.Y.R. Co.*, (C.C.A. N.Y. 1888) 33 Fed. 796.

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established." *Justices vs. Murray* (N. Y. 1870) 9 Wall. 278; 19 L.E. 658.

"The right of a jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Ives vs. Grand Trunk R. R. Co.*, 35 Fed. 176, Affirmed 144 U.S. 408.

The right to a jury trial to test the negligence of carriers under the Federal Employers Liability Act was unequivocally settled in the recent case of *Bailey vs. Central Vt. Ry.*, 319 U.S. 350 (1943), involving the analogous problem, whether, under given facts, the carrier had used reasonable care to provide a safe place to work. In upholding plaintiff's right to go to the jury, Justice Murphy, said;

> "The nature of the tasks which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had . . . were facts and circumstances for the jury to weigh. . . . The jury is the tribunal to decide that type of issue. . . . To withdraw such a question from the jury is to usurp its functions.
>
> "The right to a trial by jury is a basic and fundamental feature of our system of federal jurisprudence. . . . It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in the other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

CONCLUSION.

1. It is respectfully submitted that the petitioner has supplied adequate facts to create a jury issue.

2. The decision of the United States Circuit Court of Appeals (3rd Circuit) is in direct conflict with the decisions of this Court in the *Blair*, *Bailey* and *Tennant* cases (supra).

3. The petitioner has been deprived of his constitutional right to a trial by jury.

4. The petitioner, as one of thousands of *non-operating* employees, requires judicial expression that assumption of risk is no longer a defense as to these employees too, and that acts of omission may well constitute negligence and are not to be viewed as a form of assumption of risk under the nomenclature of non-negligence.

Respectfully submitted,

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